83-893
No. 83-

Office - Supreme Court, U.S.
FILED
NOV 30 1983

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - Cross-Petitioners

versus

TIMOTHY TILTON, Et Al. - - Cross Respondents

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAN C. McCUBBIN*
General Counsel
Board of Education of Jefferson County, Kentucky
3332 Newburg Road
Louisville, Kentucky 40218
(502) 456-3154

ROBERT L. CHENOWETH
Assistant Deputy Attorney General
Capitol Building
Frankfort, Kentucky 40601
(502) 564-7600
Counsel for Cross-Petitioners Kentucky Department of Education, et al.

Of Counsel:

FRANCIS J. MELLEN, JR.
GLENN ALAN COHEN
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
Counsel for Cross-Petitioners Board of Education of Jefferson County, Kentucky, et al.

PAUL F. FAURI
General Counsel
By: MARTIN Z. KASDAN, JR.
Office of the Counsel
Kentucky Cabinet for Human Resources
275 East Main Street—4 West
Frankfort, Kentucky 40621
(502) 564-7900
Counsel for Cross-Petitioners Kentucky Cabinet for Human Resources, et al.

*Counsel of Record

November 30, 1983

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3331, LOUISVILLE, KY.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred by disregarding the findings of the trial court (which were based on uncontradicted testimony) and by independently holding that a day treatment program for emotionally disturbed children conducted by a state health and welfare agency was an "educational placement" for purposes of the Education for All Handicapped Children Act.

II. Assuming that the Court of Appeals properly held that the day treatment program was an "educational placement," whether the Court of Appeals erred by holding that the closing of the program was a "change in placement" for purposes of the Education for All Handicapped Children Act.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals for the Sixth Circuit were the Board of Education of Jefferson County, Kentucky (incorrectly sued under the name Jefferson County Board of Education), Scott Detrick, Lyman Johnson, Anthony Gamboa, Michael W. Wooden, William Stites, James Hearn, C. B. Young, Jr., David DeRuzzo, Reginald Green, David Weber, Kentucky Department of Education, Raymond Barber, Billie Downing, Sharon Embry, Kentucky Department (now Cabinet) for Human Resources and Grady Stumbo, all of whom are Cross-Petitioners in this Court; and Timothy Tilton, a minor by his legal guardian and next friend, Mona Richards, Robert McDaniel, a minor, by his parent and next friend, Anita McDaniel, and Del Shawn Morris, a minor, by his parent and next friend, Regina Morris, all of whom are Cross-Respondents in tihs Court.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties to the Proceeding in the Court of Appeals	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2–8
Reasons for Granting the Writ	8–15
I. By Failing to Recognize the Significant Differences Between a Treatment Program for Emotionally Disturbed Children and an Educational Placement, the Court of Appeals has Jeopardized All Other Such Treatment Programs	8–12
II. The Court of Appeals Erred by Holding That There Had Been a "Change of Placement" When Jewel Manor Was Closed	12–15
Conclusion	15
Proof of Service	16
Appendix A—6th Circuit Order and Opinion of April 19, 1983	17
Appendix B—6th Circuit Order of August 1, 1983	27
Appendix C—Order and Decision of U. S. District Court of June 5, 1981	28
Appendix D—Statutory Provisions Involved	32

TABLE OF AUTHORITIES

Cases:

	PAGE
Graver Tank & Mfg. Co. v. *Linde Air Products Company*, 336 U. S. 271 (1940)	8
United States v. *National Association of Real Estate Boards*, 339 U. S. 485 (1950)	9
United States v. *United States Gypsum Co.*, 333 U. S. 364 (1948)	8
Bright v. *Nunn*, 448 F. 2d 245 (6th Cir. 1971)	3
Concerned Parents & Citizens For Continuing Education At Malcolm X (P.S. 79) v. *New York City Board of Education*, 629 F. 2d 751 (2nd Cir. 1980), *cert. denied*, 101 S. Ct. 858 (1981)	13
Darlene L. v. *Illinois State Board of Education*, 568 F. Supp. 1340 (N.D. Ill. 1983)	11, 12
Harris v. *Campbell*, 472 F. Supp. 51 (E.D. Va. 1979)	13
Kruelle v. *New Castle County School District*, 642 F. 2d 687 (3rd Cir. 1981)	10
Monahan v. *State of Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), 687 F. 2d 1164 (1982) (Aff'd in part, vacated and remanded in part on other grounds)	14
Tatro v. *Texas*, 625 F. 2d 557 (5th Cir. 1980)	10
Tokarcik v. *Forest Hills School District*, 665 F. 2d 443 (3rd Cir. 1981), *cert. denied* ____ U. S. ____, 102 S. Ct. 3508 (1982)	10

Statutes:

20 U.S.C. §1401 *et seq.*	4
20 U.S.C. §1401(17)	2, 10
20 U.S.C. §1412(5)(B)	13
20 U.S.C. §1415(b)(2)-(e)	13
20 U.S.C. §1415(e)(3)	12, 14
29 U.S.C. §794	4
42 U.S.C. §1983	4
KRS 156.010	11

PAGE

KRS 160.160 11
KRS 160.290 11
KRS 194.010 11
KRS 208 6

Miscellaneous:

Fed. R. Civ. P. 25(d) 3
Fed. R. Civ. P. 52(a) 8
Adams, Commentary, "Post-Rowley: Direction from the Courts Regarding an 'Appropriate' Education," *West Education Law Reporter* (September 8, 1983 Advance Sheet) 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - *Cross-Petitioners*

v.

TIMOTHY TILTON, Et Al. - - *Cross-Respondents*

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1983 and was officially reported at 705 F. 2d 800 (App. A). The order denying the petition for rehearing *en banc* was entered August 1, 1983 (App. B). The final order and opinion of the United States District Court for the Western District of Kentucky was entered on June 5, 1981 (App. C).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 19, 1983 (App. A). The petition for rehearing *en banc* was denied on August 1, 1983 (App. B). The petition for certiorari in connection with which this cross-petition is filed was received by the Cross-Petitioners on November 1, 1983, and this cross-petition is filed in reliance on Rule 19.5 of the Rules of the United States

Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISONS INVOLVED

The Education of the Handicapped Act, 20 U.S.C. § 1401 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. 94-142 (App. D).

STATEMENT OF THE CASE

A. Nature of Case and Course of Proceedings

This action was brought on behalf of three emotionally disturbed children, by and through their parents or guardians and next friends ("Plaintiffs"), to protest the closing of the Jewel Manor Day Treatment Center ("Jewel Manor"). Although Plaintiffs alleged in their complaint that they were class representatives, no motion for class certification was ever filed.

There were three sets of Defendants below (Cross-Petitioners here): the Board of Education of Jefferson County, Kentucky and its members and certain of its employees (collectively referred to herein as the "Board"), the Kentucky Department (now Cabinet) for Human Resources and its Secretary (collectively referred to herein as "KCHR"), and the Kentucky Department of Education and certain of its employees (collectively referred to as "KDOE").[1]

---

[1]The Cross-Petitioners are the three government agencies and the 14 individual officers and employees of those agencies who were named as Defendants in the Complaint. Each counsel for the respective Cross-Petitioners represents one of the agencies and the

(Footnote continued on following page)

Plaintiffs sought a temporary restraining order which was denied after a hearing on May 28, 1981, by the Honorable Thomas A. Ballantine, Jr., the Judge who presided over the proceedings below. Plaintiffs then moved for a preliminary injunction, and a plenary hearing on this motion was held on June 3 and 4, 1981. After Plaintiffs presented the testimony of ten lay and expert witnesses, all Defendants successfully moved the Court to overrule the motion for preliminary injunction. By order dated June 5, 1981, (20A),[2] Judge Ballantine overruled the motion and dismissed the case.[3]

Plaintiffs thereafter filed a timely notice of appeal (24A). On June 11, 1981, Plaintiffs moved for an injunction pending appeal. After receiving responses

---

(Footnote continued from preceding page)

officers and employees of that agency. Since the time the Complaint was filed, eight of the 14 individuals named in the Complaint have been replaced by their duly elected or appointed successors. Additional changes in these offices and positions will probably occur before this Court reaches a decision on the Cross-Petition. Because the allegations of the Complaint are directed primarily toward the three agency respondents, counsel have not sought an order of substitution with respect to each new officer and employee, and do not intend to do so in the future. *See*, Fed. R. Civ. P. 25(d).

[2]References are to the Appendix as filed in the Court of Appeals for the Sixth Circuit.

[3]Judge Ballantine's dismissal of the action after the preliminary injunction hearing was not disturbed by the Court of Appeals. In *Bright* v. *Nunn*, 448 F. 2d 245 (6th Cir. 1971), the same appellate court similarly upheld a dismissal of a civil rights action after only a preliminary injunction hearing, where ". . . the facts disclosed by the record [were] uncontested in the decisive respects of this case. . . ." The facts in the case at bar, presented solely by witnesses for the Plaintiffs, were equally uncontested.

by all Defendants, Judge Ballantine overruled this motion by Order dated July 13, 1981. Ultimately on appeal, the Sixth Circuit affirmed the denial of the preliminary injunction and the dismissal of the action. However, the Sixth Circuit's affirmance was based on principles other than those used by the District Court and without reference to the facts as found below.

Plaintiffs alleged below that the closing of a day treatment program for emotionally disturbed children somehow invoked the protection of the Education of the Handicapped Act, 20 U.S.C. § 1401 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. 94-142 (the "Act") and the regulations promulgated thereunder. As a collateral cause of action, Plaintiffs alleged that this closure would also be violative of Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794. Certain pendent state law claims were also alleged, and all of these claims were alleged to have arisen under 42 U.S.C. § 1983 (4A *et seq.*) However, the Plaintiffs on appeal only pursued their purported claims under the Act and apparently abandoned these other alleged causes of action. *See,* footnote 1 in the Sixth Circuit's Opinion, App. A, p. 19.

A review of the Plaintiff's own uncontested evidence and the law will demonstrate the propriety of Judge Ballantine's decision. Furthermore, this uncontested proof will show that the Court of Appeals totally ignored the facts of the case by not recognizing that a treatment center for emotionally disturbed children is, in fact and law, something quite different from

any "educational placement" contemplated by the Act. Even assuming arguendo that this was, at least technically, an "educational placement," the Court of Appeals erred in determining that the closure of Jewel Manor for financial reasons was a "change in placement."

B. Statement of the Facts

The Plaintiff's own uncontested proof established beyond peradventure that Jewel Manor was a program to treat emotionally disturbed children, not an educational placement.

Plaintiffs' first three witnesses were parents or guardians of children who received therapy at Jewel Manor. Mona Richards, guardian of Timothy Tilton, testified (31A-34A) as to the severe emotional problems and disorderly behavior of her ward. Regina Morris, mother of Del Shawn Morris, testified as to the behavioral and social problems exhibited by her son (51A-53A). Suzanne Kelley also testified as to her son Brian's behavior problems (66A-67A). For the most part, the Plaintiffs' testimony was centered on behavioral progress resulting from the counseling that was made available at Jewel Manor by the KCHR, rather than on the educational program offered there by the Board. (See, e.g., 35A, 38A, 71A).

The Plaintiffs' next witness was the Honorable Richard FitzGerald, a District Court Judge for Jefferson County, assigned to the Juvenile Division of District Court. Judge FitzGerald testified, at 88A, that he was familiar with community resources available

for children referred to this court under state law (KRS Chapter 208). Throughout his testimony (87A-109A), Judge FitzGerald referred to the treatment orientation of Jewel Manor. See, for example, the following quotation (99A):

> Q. [by Mr. Chenoweth]: So you come at a consideration of education only as an ancillary to treatment consideration of the child before you?
>
> A. Yes.

Judge FitzGerald also testified, especially at 102A-103A, that treatment services similar to those provided at Jewel Manor were available in the community.

The Plaintiffs next presented the testimony of Deborah Whitwood, employed by the Board at Stonestreet Elementary School as ". . . an elementary emotionally disturbed, behavior disordered teacher. . . ." (110A). Ms. Whitwood testified (124A) that Jewel Manor was ". . . *primarily* concerned with the emotional stability and the social growth of children that lack those skills or who have . . . problems coping. . . ." [emphasis added].

On the following day, June 4, 1981, Plaintiffs presented the testimony of five more witnesses. The first witness on the second day was Judy Repko, employed by KCHR as Director of Jewel Manor. Her testimony (130A-158A) emphasized the treatment aspects of the program at Jewel Manor. For example, she stated at 132A that ". . . the behavior problem has to be the primary reason for referral." Although Ms. Repko admitted that if she had the power to do so, she would

like to keep Jewel Manor open (157A), she went on to state as follows (157A):

> Q. [by Mr. Kasdan] To you, is Jewel Manor a building with a name on it?
>
> A. In my opinion, Jewel Manor is a philosophy. It is not a building. It is a philosophy on how emotionally disturbed children and behavior problem children can be effectively *treated*. It happens to be housed in three buildings that are called Jewel Manor. But it is a philosophy of how you look at children and how you deal with children. You know, the philosophy could be done in this room. [emphasis added]

The next witness presented by Plaintiffs was a psychologist, Richard Johnson, Ph. D. He testified that he had not visited Jewel Manor since 1977-78. He testified that he had not been involved with the preparation of the "Individual Education Program" (IEP) for any child at Jewel Manor (176A). He further testified (181A) that he had no clinical involvement with any of the children being treated at Jewel Manor.

Nancy Ellinger, employed by KCHR as a team leader at Jewel Manor, next testified for Plaintiffs. She testified (200A) that the services provided at Jewel Manor could be provided elsewhere. Particularly important is her testimony (212A) that the treatment aspect was more heavily weighted than the educational aspect of the Jewel Manor program. Plaintiffs finally called two other team leaders, Jo Ann Rothrock and Beverly Hampton. They testified generally as to the

treatment programs which they helped to provide at Jewel Manor.

In short, Plaintiffs presented a large number of witnesses, both lay and expert. Every single witness emphasized that the *raison d'etre* of Jewel Manor was the provision of treatment to emotionally disturbed children. Based on this undisputed testimony, the District Court properly held that Jewel Manor was ". . . a restrictive facility, the *primary* purpose of which [was] the *treatment* of emotionally disturbed children." (22A) [emphasis added]

REASONS FOR GRANTING THE WRIT

I. By Failing to Recognize the Significant Differences Between a Treatment Program for Emotionally Disturbed Children and an Educational Placement, the Court of Appeals has Jeopardized All Other Such Treatment Programs.

This Court has stated on many occasions that it is a court of law and, as such, does not exist merely to correct factual mistakes in the lower courts. See, e.g., *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949). This approach reflects the mandate of Rule 52(a), Federal Rules of Civil Procedure, which states in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The classic definition of "clearly erroneous" is found in *United States* v. *United States Gypsum Company*, 333 U. S. 364 (1948), at 395 [hereinafter cited as *U. S. Gypsum*]:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the firm and definite conviction that a mistake has been committed.

Shortly after *U. S. Gypsum,* this Court expounded further on the meaning of the Rule 52(a) "clearly erroneous" standard:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. See [cite omitted]; [*U. S. Gypsum*], 333 U. S. 364, 394-395. We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous."

United States v. *National Association of Real Estate Boards,* 339 U. S. 485 (1950), at 495-96.

Considering the uncontradicted expert and lay testimony presented below, the following observations of this Court as to the witness credibility clause of Rule 52(a) are instructive:

> To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations. * * * [The judge] heard many experts and other witnesses. He wrote a careful and succinct opinion and made findings covering all the factual issues.
>
> The rule requires that an appellate court make allowance for the advantages possessed by the trial

> court in appraising the significance of conflicting testimony and reverse only "clearly erroneous" findings. * * *
>
> *Graver Tank, supra,* at 274-75.

Despite the foregoing teachings of this Court, the Court of Appeals brushed aside the District Court findings, the testimony of each and every witness below, and concluded that the intensive emotional counseling program provided at Jewel Manor was tantamount to an "educational placement" for purposes of the Act. The only cases cited by the Court of Appeals are clearly distinguishable from the case at bar. In *Kruelle* v. *New Castle School District,* 642 F. 2d 687 (3rd Cir. 1981), the Court upheld a residential *educational* program for a profoundly mentally retarded youth, not a *treatment* program for disturbed youths such as those in the case at bar.

In both *Tokarcik* v. *Forest Hills School District,* 665 F. 2d 443 (3rd Cir. 1981), *cert. den.* — U. S. —, 102 S. Ct. 3508 (1982), and *Tatro* v. *Texas,* 625 F. 2d 557 (5th Cir. 1980), the only issue was the provision of catheterization to students *enrolled in typical school programs.* The catheterization was clearly a "related service"[4] secondarily provided to children in school

[4] 20 U.S.C. § 1401(17) provides that "related services" consist of "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education . . ."

environments. By contrast, the educational component at Jewel Manor was the secondary service, provided to children in a day treatment program to help them overcome their emotional disturbances. *See, Darlene L.* v. *Illinois State Board of Education,* 568 F. Supp. 1340 N. D. Ill. 1983). The only testimony adduced by the Plaintiffs themselves below showed that educational services would continue to be provided.

In the exercise of this Court's supervisory powers over the lower federal courts, the Court of Appeals' summary reversal of the District Court's findings of fact should be reversed as to the failure to distinguish between a treatment program such as Jewel Manor and an educational placement such as those in the cases cited by the Court of Appeals.

If this Court should fail to grant this Cross-Petition, the published opinion of the Court of Appeals will stand as an open invitation to the federal judiciary to intrude into such traditional state functions as providing therapy and treatment for disturbed youngsters. In this light, it is pertinent to underline the fact that it was KCHR which made the determination to close this program. By state law, KCHR is required to provide *health and social services,* not education. KRS 194.010 *et seq.* By contrast, both KDOE and the Board are authorized and required to provide *educational* programs. KRS 156.010, 160.160 and 160.290. It was the cutback of funds to KCHR which led to the dissolution of the KCHR program at Jewel Manor.

If the logic of the Court of Appeals is allowed to stand, then every juvenile treatment program run by

KCHR and its sister agencies throughout the country will run the risk of being subjected to standards, procedures and regulations which were never intended to be applied to such programs. *See, Darlene L.* v. *Illinois State Board of Education, supra;* Adams, Commentary, "Post-Rowley: Direction from the Courts Regarding an 'Appropriate' Education," *West Education Law Reporter* (September 8, 1983 Advance Sheet).

II. The Court of Appeals Erred by Holding That There Had Been a "Change of Placement" When Jewel Manor Was Closed.

The Sixth Circuit held that the closing of Jewel Manor was in violation of 20 U.S.C. § 1415(e)(3), which prohibits, without the providing of due process procedures, the changing of a handicapped student's educational placement during the pendency of any administrative or judicial proceedings involving the identification, evaluation or educational placement of the child, or involving the provision of free appropriate public education. However, in reaching this result, the Sixth Circuit confused the physical placement of the subject children for behavioral treatment with their educational placement.

The fact that the physical placement of the subject children changed as a result of the closing of Jewel Manor is undeniable, but that fact is totally irrelevant to an inquiry under 20 U.S.C. §1415(e)(3). The closing of Jewel Manor for fiscal reasons obviously caused a change in the physical placement of the subject children, but there was nothing in the record to indicate that this change in physical placement was accom-

panied by a corresponding change in the educational placement of any of the subject children.

In *Concerned Parents & Citizens For Continuing Education At Malcolm X (P.S. 79)* v. *New York City Board of Education,* 629 F. 2d 751 (2d Cir. 1980), *cert. denied,* 101 S. Ct. 858 (1981), the court held that the term "educational placement" refers only to the general educational program in which a child is placed and not to the various adjustments in that program that an educational agency may determine to be necessary in the exercise of its discretion. Thus, the court held that the closing of a school for budgetary reasons by the New York City Board of Education and the consequent transfer of some special education students to other schools did not constitute a change in educational placement since the students remained in the same school district and continued to receive special education programs. The court noted that the transfer of the children "may actually further the statutory goal of integrating handicapped children into the regular educational process," citing 20 U.S.C. §1412(5)(B). 629 F. 2d at 756, n. 6. The court also noted that the parents or guardians of the children were provided the right to present their complaints at a full administrative hearing, and that the parents or guardians had the right to judicial review of adverse agency determinations "after exhaustion of administrative remedies," citing 20 U.S.C. § 1415(b)(2)-(e) and *Harris* v. *Campbell,* 472 F. Supp. 51 (E.D. Va. 1979). The court stated:

> These procedural protections provide an adequate means by which the parents of the handicapped children transferred from P.S. 79 can seek to insure that schools at which the children were relocated provide an appropriate education. 629 F. 2d at 756-57.

Similarly, in *Monahan* v. *State of Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980), 687 F. 2d 1164 (1982) (Aff'd in part, vacated and remanded in part on other grounds) one of the children involved in that case had been attending a public junior high school in Omaha, Nebraska, school district by the name of Beveridge Junior High School. The child's parents were notified by school officials of a proposed change of educational placement. The Nebraska Federal District Court, in considering the matter under 20 U.S.C. §1415(e)(3) and trying the current educational placement at the time the complaint was filed (which educational placement was at the Beveridge Junior High School) stated:

> "This holding which required Marla to be readmitted to the Omaha public schools does not mean that Marla must be placed in Beveridge Junior High. If other schools can provide the *same type of education* that she received at Beveridge, then placement in those schools would satisfy 20 U.S.C. §1415(e)(3). (Emphasis ours) 491 F. Supp. at 1090.

Cross-Petitioners submit that the District Court correctly held that the Plaintiffs' evidence failed to show that the same type of education for the subject children was unavailable in other public school facilities in the Jefferson County School District.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant this Cross-Petition for Writ of Certiorari, to not only retain the result, but also restore the factual determinations and legal conclusions of the District Court.

Respectfully submitted,

DAN C. MCCUBBIN
General Counsel
Board of Education of Jefferson County, Kentucky
3332 Newburg Road
Louisville, Kentucky 40218
(502) 456-3154

Of Counsel:

FRANCIS J. MELLEN, JR.
GLENN ALAN COHEN
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
Counsel for Cross-Petitioners Board of Education of Jefferson County, Kentucky, et al.

ROBERT L. CHENOWETH
Assistant Deputy Attorney General
Capitol Building
Frankfort, Kentucky 40601
(502) 564-7600
Counsel for Cross-Petitioners Kentucky Department of Education, et al.

PAUL F. FAURI
General Counsel
By: MARTIN Z. KASDAN, JR.
Office of the Counsel
Kentucky Cabinet for Human Resources
275 East Main Street—4 West
Frankfort, Kentucky 40621
(502) 564-7900
Counsel for Cross-Petitioners Kentucky Cabinet for Human Resources, et al.

PROOF OF SERVICE

I, Dan C. McCubbin, one of the counsel of record for the Cross-Petitioners having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of this Cross Petition were mailed, first class mail, postage prepaid, to Geneva Faye Parris and David Alan Friedman, Counsel for the Petitioners, Legal Aid Society, Inc., 425 West Muhammad Ali Boulevard, Louisville, Kentucky 40202, this 29th day of November, 1983.

Dan C. McCubbin

DAN C. MCCUBBIN

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 81-5449

TIMOTHY TILTON, by his Guardian and Next Friend, MONA RICHARDS, et al., - *Plaintiffs-Appellants,*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al., - - - - - - *Defendants-Appellees.*

ON APPEAL from the United States District Court for the Western District of Kentucky

---

JUDGMENT—Filed April 19, 1983

Before: KENNEDY and KRUPANSKY, Circuit Judges; and RUBIN, District Judge.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

No. 81-5449

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TIMOTHY TILTON, by his Guardian and Next Friend, MONA RICHARDS, et al., - *Plaintiffs-Appellants,*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al., - - - - - - *Defendants-Appellees.*

ON APPEAL from the United States District Court for the Western District of Kentucky

---

OPINION—Decided and Filed April 19, 1983

Before: KENNEDY and KRUPANSKY, Circuit Judges and RUBIN, District Judge.*

RUBIN, District Judge. Plaintiffs, minors suing by their next friend, seek reversal of a District Court Order which denied a Motion for Preliminary Injunction. All plaintiffs are emotionally handicapped children who had received treatment and education at Jewel Manor, a day treatment facility, operated by the Kentucky Department of Human Resources ("DHR").

Jewel Manor provided the only 12-month day treatment program for seriously emotionally handicapped children available in the Jefferson County public schools. It featured a parental involvement and counseling program and

---

*The Honorable Carl B. Rubin, Chief Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

a special education/therapy program coordinated by specially-trained teachers.

In May of 1981, DHR closed Jewel Manor for budgetary reasons. Plaintiff sought the Preliminary Injunction to compel the DHR, the Jefferson County Board of Education ("County Board") and the Kentucky Department of Education ("DOE") to continue the operations of Jewel Manor.

At issue herein is an interpretation of The Education for All Handicapped Children Act ("EHCA" or "the Act"), 20 U.S.C. § 1400 *et seq.* passed by Congress in 1975.[1] Plaintiffs-appellants assert that the termination of the program at Jewel Manor constituted a change in placement under the Act and, pursuant to § 1415(e)(3), the state was precluded from instituting this change during the pendency of proceedings contesting the propriety of its actions. Consequently, appellants seek an order directing defendants to reopen Jewel Manor or, alternatively, provide services substantially similar to those previously available at Jewel Manor, until final resolution of their complaints under the Act.

I.

The EHCA provides federal money to assist state and local agencies in educating handicapped children. Such funding is conditioned upon a compliance with specific procedures designed to assure "all handicapped children the right to a free, appropriate public education." 20 U.S.C. § 1412(1). Specifically, 20 U.S.C. § 1415 requires the states to adopt and maintain, *inter alia*, the following procedures:

---

[1]Appellants have offered no basis to sustain their action under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, 42 U.S.C. § 1983, or KRS §§ 157.200 to 157.305.

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provisions of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

If the due process hearing is conducted by a local agency then the parent or guardian may appeal an adverse decision to the state agency. § 1415(c). Any party aggrieved by a final agency decision may initiate a civil action "with respect to the complaint presented." § 1415(e)(2). Finally, and most pertinent to the instant matter, subsection (e)(3) of § 1415 provides, in relevant part:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child.

II.

Initially, defendants contend that the assignment of children to Jewel Manor was not an "educational placement" within the meaning of the Act. They argue that Jewel Manor was a treatment facility only, and therefore outside the scope of the Act. This argument is without merit.

The term "educational placement" is not defined in the Act; however, "free appropriate public education" is defined as "special education and related services" which meet certain requirements set out in the statute. 20 U.S.C. § 1401(18). "Special education" refers to "specially designed instruction . . . to meet the unique needs of a handicapped child." 20 U.S.C. § 1401(16). "Related services" includes "such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education. . . ." 20 U.S.C. § 1401(17).

In light of these definitions, defendants' attempt to characterize the program at Jewel Manor as "treatment," rather than "education," must fail. The concept of education under the Act clearly embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of "treatment." Any attempt to distinguish academics from treatment when defining "educational placement" runs counter to the clear language of the Act. There can be no question that plaintiffs' assignment to Jewel Manor was an educational placement within the meaning of the Act. *See e.g., Krulle*

v. *New Castle County School District*, 642 F. 2d 687, 693 (3rd Cir. 1981) (holding that a residential placement is encompassed within the term "special education"). *See also, Takarcik* v. *Forest Hills School District*, 665 F. 2d 443 (3rd Cir. 1981), *cert. denied*, 102 S. Ct. 3508 (1982) (catheterization is a "related service"); *Tatro* v. *State of Texas*, 625 F. 2d 557 (5th Cir. 1980) (same).

Defendants next assert that, even if the Jewel Manor program was subject to the EHCA, the closing of the school and reassignment of the plaintiffs was not a change in placement. Defendants principally rely on *Concerned Parents & Citizens for the Continuing Education of Malcolm X. (PS79)* v. *New York City Board of Ed.*, 629 F. 2d 751 (2nd Cir. 1980), *cert. denied*, 449 U. S. 1078 (1981). In that case, one school, P.S. 79, was closed for budgetary reasons, and the 185 handicapped children enrolled there, out of a total enrollment of 310, were moved to different schools which did not provide the "extremely innovative educational program" available at P.S. 79. The District Court found this to be a change in educational placement under the Act. In reversing, the Second Circuit stated that "the term 'educational placement' refers only to the general type of educational program in which the child is placed." 629 F. 2d at 753. The Court stated that the requirements of § 1415 would not be triggered by a decision to transfer the special educational classes from one school to another, even if the new programs varied somewhat from the old. *Id.* at 753-54. Special education refers to the general program and not variations within it. *Id.* The Court noted that the language of § 1415(b)(1)(c), *supra*, suggested that the requirements of § 1415 were limited to "certain fundamental decisions regarding . . . the most appropriate type of educational program for assisting a child with . . . a handicap." *Id.* The Court also stated that the applicable regulations supported this interpretation, and gave as an

example of a fundamental change the transfer of a child from a special class in a regular school to a special school. *Id.* The Court noted that defining a change in placement to include any alterations in a program "would virtually cripple the Board's ability to implement even minor discretionary changes within the educational programs provided for its students" and would also inhibit the Board from introducing new activities or programs. *Id.* at 775. The Court, in concluding that no change in placement had occurred, stated, "More explicit statutory language is required to justify an interpretation that would so constrain the discretion of educational agencies. . . ." *Id.*

The situation in the instant case is distinguishable. The evidence below tended to demonstrate that the programs at alternate schools are not comparable to the Jewel Manor program. Most significantly, all of the alternate placements were limited to 180-day programs whereas Jewel Manor provided year-round instruction. *See generally, Battle* v. *Commonwealth of Pennsylvania,* 629 F. 2d 269 (3rd Cir. 1980), *cert. denied,* 452 U. S. 968 (1981) (inflexible 180-day rule precludes the proper formulation of appropriate education). Testimony indicated that summer instruction was a significant facet of the Jewel Manor program. Accordingly, we conclude that the closing of Jewel Manor and transfer of these plaintiffs was a change in placement under the EHCA.

It does not, however, necessarily follow that the District Court erred in refusing to enjoin the closing of Jewel Manor, even though, in the usual case, a change in placement cannot take place absent the procedural protections of § 1415, including the requirement imposed by § 1415(e)(3) that the child remain in his or her "current educational placement" during the pendency of any proceedings initiated pursuant to § 1415. *See Kaelin* v. *Grubbs,* 682 F. 2d 595 (6th Cir. 1982). The procedural protections of § 1415

are designed to provide for maximum participation by the parents or guardians of handicapped children in the decisions concerning placement of handicapped children.[2] These procedures were established as a result of a Congressional concern that children were suffering from erroneous identification and classification of handicapping impediments. *See,* S.Rep. No. 94-168, 94th Cong., 1st Sess. [1975], U. S. Code Cong. & Admin. News 1450-51. *See also, Concerned Parents, supra,* at 754. Because of its belief that erroneous classifications were widespread, Congress determined that the interests of the handicapped child would best be served by imposing the status quo upon placement pending the resolution of any parental complaints prompted by a proposed change in placement. However, nothing in the legislative history or the language of the Act implies a legislative intent to permit interested parties to utilize the automatic injunctive procedure of § 1415 (e)(3) to frustrate the fiscal policy of participating states.

It is well-settled that "[b]y and large, public education in our Nation is committed to the control of state and local authorities." *Epperson* v. *Arkansas,* 393 U. S. 97, 100 (1968). These authorities do not, by electing to receive funds under the EHCA, abdicate their control of the fiscal decisions of their school systems. Stated in the alternative, Congress did not compel, as the price for federal participation in education for the handicapped, a wholesale transfer of authority over the allocation of educational resources from the duly elected or appointed state and local boards to the parents of individual handicapped children.

Clearly, however, applying the statutory injunction of § 1415(e)(3) to changes in placement occasioned solely by

---

[2]As the Supreme Court noted, this provision is part of the Congressional scheme to encourage parental involvement in the education of handicapped children. *Board of Education* v. *Rowley,* __ U. S. __, 102 S. Ct. 3034, 3033 n.6 (1982).

economic decisions would effect a transfer of power. The appellants could forestall implementation of a fiscal policy decision while pursuing complaints through the procedural framework of § 1415. The exhaustion of administrative remedies coupled with available judicial review contemplated by § 1415 could conceivably entail several years of protracted litigation. During this period, were the Court to accept appellants' position, the state would be obliged to finance a program it had determined to be unaffordable simply because concerned parents or guardians alleged deficiencies in substitute programs. Congress certainly never intended such a result.

Moreover, the appellants' position could undermine the statutory purpose of providing an appropriate education to *all* handicapped children. As indicated, the state could be obligated, against its reasoned judgment, to finance a program for some handicapped children because of the bare allegations of a single interested party. This forced spending might well deprive other handicapped children of needed resources.

Finally, our conclusion that § 1415(e)(3) cannot be invoked to foreclose a change in placement arising solely as a result of economic considerations does not necessarily leave appellants without an adequate remedy to contest the sufficiency of the new placements. Appellants may initiate complaints "with respect to any matter relating to the . . . educational placement" of the children pursuant to §1415(b)(1)(E) and they are insured due process regarding any complaints by virtue of § 1415(b)(2).

We are supported in our conclusion by the Supreme Court's recent decision in *Board of Education* v. *Rowley*, ____ U. S. ____ (1982) (No. 80-1002 June 28, 1982). In *Rowley*, the Court indicated that, despite the broad range of services *permitted* under the Act's definition of "free appropriate public education," there are limits on which a

state is *required* to provide. In rejecting the argument that the states were required to "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children," the Court stated that Congress was primarily concerned with identifying and evaluating handicapped children and providing them with access to a free public education. Slip op. at 23. The Court held that the requirement of a free appropriate education was satisfied by providing "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 26. The Court went on to caution that courts must avoid imposing their views of preferable educational methods on the states, where responsibility, under the Act, for choosing the method most suitable to the child's needs was vested. *Id.* at 30.

We hold, then, that if a state or local agency must discontinue a program or close a facility for purely budgetary reasons, the requirements of 20 U.S.C. § 1415(e)(3) do not apply. The Judgment of the District Court is AFFIRMED.

APPENDIX B

No. 81-5449

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TIMOTHY TILTON, By His Guardian and Next Friend, MONA RICHARDS, Et Al. - *Plaintiffs/Appellants*

v.

JEFFERSON COUNTY BOARD OF EDUCATION, Et Al. - - - - - *Defendants/Appellees*

ORDER DENYING PETITION FOR REHEARING—
Filed August 1, 1983

Before: KENNEDY and KRUPANSKY, Circuit Judges; and RUBIN,* District Judge.

The Court not having favored rehearing en banc in the above case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman, Clerk

---

*Honorable Carl B. Rubin, Chief Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 81-0314-L(B)

TIMOTHY TILTON, Et Al. - - - - *Plaintiffs*

v.

JEFFERSON COUNTY SCHOOL BOARD, Et Al. - *Defendants*

ORDER—Entered June 5, 1981

For the reasons set forth in the Memorandum filed this date,

IT IS ORDERED that the motion of the plaintiffs, Timothy Tilton, a minor, by his legal guardian and next friend, Mona Richards; Robert McDaniel, a minor, by his legal guardian and next friend, Anita McDaniel; Delshawn Morris, a minor, by his legal guardian and next friend, Regina Morris, for a preliminary injunction against the defendants, Jefferson County Board of Education; Scott Detrick; Lyman Johnson; Anthony Gamboa; Michael W. Wooden; William Stites; James Hearn; C. B. Young, Jr.; David De Ruzzo, Reginald Green; David Weber; Kentucky Department of Education; Raymond Barber; Billie Downing; Sharon Embry; Department of Human Resources; Grady Stumbo, be and it hereby is denied and this action is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable Order.

This 5th day of June, 1981.

/s/ Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 81-0314-L(B)

TIMOTHY TILTON, Et Al. - - - - *Plaintiffs*

v.

JEFFERSON COUNTY SCHOOL BOARD, Et Al. - *Defendants*

MEMORANDUM—Entered June 5, 1981

This motion for preliminary injunction was heard by the Court on June 3 and June 4, 1981. At the conclusion of plaintiffs' evidence the Court granted defendants' motion to deny the motion for preliminary injunction.

Plaintiffs, who bring this action by their parents or guardians, are emotionally disturbed children who have been receiving treatment at Jewell Manor, a facility until recently operated by defendant, Department for Human Resources. Fiscal policy led to a decision by DHR to close Jewell Manor and this action was instituted seeking to compel DHR to continue the operation of Jewell Manor. The Court's jurisdiction is invoked under the Education of Handicapped Act, Title 20 U.S.C. Section 1401 et seq.

The standards to be considered in granting or withholding injunctive relief are articulated in *Mason County Medical Association* v. *Knebel,* 563 F. 2d 256 (6th Cir. 1977):

> "In determining on appeal whether the District Court abused its discretion in granting or withholding preliminary injunctive relief, this Court has set forth four standards which must be considered:

1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
2) Whether the plaintiffs have shown irreparable injury;
3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
4) Whether the public interest would be served by issuing a preliminary injunction.

(Citations omitted.)[4]

We conclude that plaintiffs have not sustained the burden imposed upon them by the first standard.

Plaintiffs' evidence showed that Jewell Manor is a restrictive facility, the primary purpose of which is the treatment of emotionally disturbed children. Its goal is to improve the children to a point at which they are able to cope with the educational process. Concomitant with the treatment, the youngsters receive schooling from teachers employed by the defendant, Jefferson County Board of Education.

The evidence introduced by plaintiffs established that Jewell Manor's program was a highly desirable form of therapy and one which the parents or guardians wanted

---

[4]In these two decisions, *Ohio* v. *Callaway, supra* [497 F. 2d 1235, 1241 (6th Cir. 1975)], and *SEC* v. *Senex Corp., supra* [534 F. 2d 1240, 1241 (6th Cir. 1976)], this Court used unfortunate terminology when it stated that one of the four standards or prerequisites for the equitable relief of a preliminary injunction is that there must be a 'possibility' of success on the merits. A showing of a mere 'possibility' of success would render the test for a preliminary injunction virtually meaningless. Therefore, we reiterate that the plaintiffs must demonstrate a strong or substantial *likelihood* or *probability* of success on the merits." (Emphasis in original.) 563 F. 2d at 261.

continued. A psychologist, Dr. Richard Johnson, testified that it would be "nice" if the operation of Jewell Manor could be continued. The personnel of Jewell Manor who testified concluded that, from a mental health standpoint, Jewel Manor was preferable to other programs available.

Plaintiffs' evidence did not establish in any degree that the educational program offered by the defendant Board of Education is inappropriate. Title 20 U.S.C. Section 1412(1) requires, "The state [to have] in effect a policy that assures all handicapped children the right to a free appropriate public education." There simply is no evidence that the programs offered by defendants fail to meet this standard, and plaintiffs' motion for preliminary injunction will be denied and this action will be dismissed.

An appropriate Order has been entered this 5th day of June, 1981.

/s/ Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

APPENDIX D

STATUTORY PROVISIONS INVOLVED

The Education of the Handicapped Act, 20 U.S.C. §1401, *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. 94-142, in particular:

20 U.S.C. §1412(5)

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

* * * * * * *

(5) The State has established (a) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

20 U.S.C. §1414(a)(7):

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

* * * * * * *

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

20 U.S.C. §1415

PROCEDURAL SAFEGUARDS

Establishment and Maintenance

(a) Any State educational agency, any local educational agency and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provisions of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hear-

ing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transferred to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such

hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub. L. 91-230, Title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.

Office-Supreme Court, U.S.
FILED
JAN 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-893

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - Cross-Petitioners

versus

TIMOTHY TILTON, Et Al. - - Cross-Respondents

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GENEVA FAYE PARRIS*
DAVID ALAN FRIEDMAN*
SHAUN W. ESPOSITO
RICHARD W. McHUGH
Legal Aid Society, Inc.
425 W. Muhammad Ali Blvd.
Louisville, Kentucky 40202
Telephone: (502) 584-1254

Counsel for Cross-Respondents, Timothy Tilton, et al.
**Counsel of Record*

Of Counsel:

JUDI M. DAVIS
W. HOWELL HOPSON, III
Western Kentucky
Legal Services

December 29, 1983

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Authorities ii

Counterstatement of the Case 1–3

Summary of Argument 3

Argument 4–9

I. The Sixth Circuit's Holding That Jewel Manor Was an "Educational Placement" Within the Meaning of the Act Presents No Conflict With Decisions of This Court or Any Court of Appeals... 4–7

II. The Sixth Circuit's Holding That the Closing of Jewel Manor Was a "Change in Placement" Presents No Conflict With Decisions of This Court or Any Court of Appeals 7–9

Conclusion 10

Proof of Service 11

TABLE OF AUTHORITIES

Cases: PAGE

Battle v. *Commonwealth of Pennsylvania*, 629 F. 2d 269 (3d Cir. 1980), *cert. denied, sub nom Scanlon* v. *Battle*, 452 U. S. 968 (1981) 9

Concerned Parents & Citizens for Continuing Education at Malcolm X (P.S. 79) v. *New York City Bd. of Ed.*, 629 F. 2d 751 (2d Cir. 1980), *cert. denied*, 449 U. S. 1078 (1981) 8

Kruelle v. *New Castle County School District*, 642 F. 2d 687 (3d Cir. 1981) 6

M.R. v. *Milwaukee Public Schools*, 495 F. Supp. 864 (E.D. Wis. 1980) 6

North v. *District of Columbia Board of Education*, 471 F. Supp. 136 (D. D.C. 1979) 6

Riley v. *Ambach*, 508 F. Supp. 136 (D. D.C. 1979).. 6

Tatro v. *State of Texas*, 625 F. 2d 557 (5th Cir. 1980) 6

Tilton v. *Jefferson County Bd. of Education*, 705 F. 2d 800 (6th Cir. 1983) 4, 5, 7

Statutes:

20 U.S.C. §1401(16) 4, 5

20 U.S.C. §1401(17) 4, 5

20 U.S.C. §1401(18) 4

Regulations:

34 C.F.R. §300.13(a) 5

34 C.F.R. §300.551 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-893

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - *Cross-Petitioners*

v.

TIMOTHY TILTON, Et Al. - - *Cross-Respondents*

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

The Cross-Respondents respectfully submit this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (the "Cross-Petition") filed on behalf of the Board of Education of Jefferson County, Kentucky, the Kentucky Department of Education, et al., and the Kentucky Cabinet for Human Resources, et al. (the "Cross-Petitioners"), and docketed in this Court on November 30, 1983.

COUNTERSTATEMENT OF THE CASE

The Cross-Respondents submit this counterstatement of the case, containing relevant facts omitted from, or insufficiently explained in, the cross-petition.

Each of the named cross-respondents is a seriously emotionally handicapped child who attended Jewel Manor Day Treatment Center until its closing for budgetary reasons. Jewel Manor offered a day treatment program for emotionally disturbed children between the ages of seven and thirteen. It featured three major components: first, a year-round structured program of education and treatment for these special children; second, parental involvement and counseling with social workers to coordinate use of therapeutic techniques at home and school; and third, a special education therapy program coordinated by specially trained teachers, social workers and support staff. The Jefferson County Public Schools offered no other year-round program for these children, nor did it offer an equivalent parent counseling program. No other program in the school system offered as favorable a ratio of children to teachers and support staff.

Each of the named cross-respondents was referred to Jewel Manor after school personnel determined that other programs were unable to meet these children's unique educational and emotional needs. Timothy Tilton was referred to Jewel Manor as a "school phobic." Then nine years old, he was unable to read, write or spell; he became aggressive when forced to attend school, biting his guardian, pulling his principal's hair and throwing a wastebasket at his teacher. Del Shawn Morris, also nine, was referred to Jewel Manor after disrupting his previous classroom, fighting with teachers and students, and calling others names.

Robert McDaniel, then ten, exhibited similar classroom aggression, but with periods of extreme withdrawal. One day, after having been paddled by his principal, Robert was found curled up in a fetal position against the wall, sucking his thumb. He was unable or unwilling to communicate with anyone. Two months before Jewel Manor closed, he was placed at the center after school personnel determined that it offered the only existing program to meet his educational, emotional and social needs.

Since Jewel Manor closed, none of these children has been able to obtain summer placements. The Jefferson County schools now offer no program beyond the traditional 180 day school year and have provided no comparable substitute for Jewel Manor's richly coordinated program of education and related services.

SUMMARY OF ARGUMENT

I. The holding of the Sixth Circuit that Jewel Manor was an educational placement within the meaning of the Act is correct as a matter of law and presents no conflict with decisions of this Court or any Circuit Court.

II. The holding of the Sixth Circuit that the closing of Jewel Manor was a change in placement within the meaning of the Act is correct as a matter of law and presents no conflict with decisions of this Court or any Circuit Court.

ARGUMENT

I. The Sixth Circuit's Holding That Jewel Manor Was an "Educational Placement" Within the Meaning of the Act Presents No Conflict With Decisions of This Court or Any Court of Appeals.

The cross-petitioners have argued throughout this litigation that Jewel Manor provided "treatment", not "education", and was therefore not subject to the requirements of the Act. The Sixth Circuit correctly rejected this contention out of hand. It held that, as a matter of law,

> . . . [a]ny attempt to distinguish academics from treatment when defining "educational placement" runs counter to the clear language of the Act. There can be no question that [petitioners'] assignment to Jewel Manor was an educational placement within the meaning of the Act.

Tilton v. *Jefferson County Bd. of Education,* 705 F. 2d 800, 803 (6th Cir. 1983). The Sixth Circuit's decision was based upon and amply supported by the specific language of the Act. The Act defines free and appropriate public education as "special education and related services", 20 U.S.C. §1401(18), and states that "special education is specially designed instruction to meet the unique needs of a handicapped child." 20 U.S.C. §1401(16). Related services include "such developmental, corrective and other supportive services . . . as may be required to assist a handicapped child to benefit from special education . . ." 20 U.S.C. §1401(17).

Relying on these specific statutory definitions and decisions from the Third and Fifth Circuits, the Sixth Circuit properly found wholly without merit the characterization of Jewel Manor as exclusively a "treatment" center. The Court stated:

> The concept of education under the Act clearly embodies both academic instruction and broad range of associated services traditionally grouped under the general rubric of "treatment."

Tilton, at 803 (1983). This conclusion of law is fully supported by the facts in the record. The program at Jewel Manor offered a coordinated program of education and treatment, including parent counseling and group and individual child counseling.

The clear statutory scheme of the Act mandates a broad range of "related services" to handicapped children, including services that may be deemed treatment, if such services are required to assist a handicapped child to benefit from special education. 20 U.S.C. §1401(17). Most significantly, the regulations promulgated under the Act state that the term "related services" includes "social work services in schools and parent counseling and training." 34 C.F.R. §300.13(a).

Congress clearly envisioned that educational services would be provided in a variety of settings, including hospitals and institutions, in order to meet the handicapped child's individual needs. 20 U.S.C. §1401(16). Indeed, the regulations require that a "continuum of alternative placements" be available to

meet a handicapped child's need for special education and related services. 34 C.F.R. §300.551.

In light of this legislative mandate, any argument that Jewel Manor offered "treatment" rather than "education" is an exercise in semantics.[1] The Sixth Circuit recognized that the mere labelling of needed services as "treatment" cannot remove these services from the ambit of the statute.

The Sixth Circiut holding is consistent with both the language of the Act and regulations and with decisions from other circuits. In *Kruelle* v. *New Castle County School District,* 642 F. 2d 687 (3d Cir. 1981), the Third Circuit noted that "the unseverability of [medical, emotional and educational] needs is the very basis for holding that the services are an essential prerequisite for learning." *Id.,* at 694. The Court therefore concluded that a residential placement was the only one suitable to meet the individual needs of that handicapped child. *See also Tatro* v. *State of Texas,* 625 F. 2d 557 (5th Cir. 1980). Reported district court decisions are likewise consistent with the Sixth Circuit's holding here. *M.R.* v. *Milwaukee Public Schools,* 495 F. Supp. 864, 869-870 (E.D. Wis. 1980); *North* v. *District of Columbia Board of Education,* 471 F. Supp. 136, 141 (D. D.C. 1979); and *Riley* v. *Ambach,* 508 F. Supp. 1222 (E.D. N.Y. 1980).

---

[1]Congress has expressed its preference for more integrated educational experiences for handicapped children wherever possible. *See Tatro* v. *State of Texas,* 625 F. 2d at 561, quoting S. Rep. No. 455, 94th Cong., 1st Sess. 30.

The Sixth Circuit did not substitute its factual judgment for that of the District Court. Rather, it found the factual record to compel the legal conclusion that Jewel Manor was an "educational placement" within the meaning of the Act. This conclusion is consistent with the statute and presents no conflict with existing case law.

II. The Sixth Circuit's Holding That the Closing of Jewel Manor Was a "Change in Placement" Presents No Conflict With Decisions of This Court or Any Court of Appeals.

Having concluded that Jewel Manor offered handicapped children "education" within the meaning of the Act, the Sixth Circuit compared the components of the program with available alternatives and properly concluded that the closing of Jewel Manor was a "change in placement" within the meaning of the Act. In so doing, the Court scrutinized with particular care the educational components of the Jewel Manor program.

Jewel Manor was unique in that it offered the only year-round educational instruction in the Jefferson County school system; all other available programs were limited to the traditional 180 days of instruction. Testimony in the District Court indicated that the year-round instruction, integrated with treatment services, was an essential component of each handicapped child's placement. *Tilton,* 705 F. 2d at 802 (1983).

The Sixth Circuit's analysis does not permit the conclusion that the Court confused the "physical place-

ment of the subject children for behavioral treatment with their educational placement". Cross-Petition at 12. To the contrary, the Court specifically compared program components before concluding that a change in placement had occurred. The Court properly found *Concerned Parents & Citizens for Continuing Education at Malcolm X (P.S. 79)* v. *New York City Bd. of Ed.*, 629 F. 2d 751 (2d Cir. 1980), *cert. denied*, 449 U. S. 1078 (1981), distinguishable. In *Concerned Parents*, the Second Circuit stated that:

> . . . the narrow question on this appeal is whether the transfer of handicapped children in special classes at one school to *substantially similar classes* at other schools within the same school district constitutes a change in "placement" sufficient to trigger the Act's prior notice and hearing requirement. (Emphasis added.)

Id., at 753. While asserting the Board's right to implement *minor* discretionary changes within the educational programs provided for its students, the Court nonetheless stated:

> Our conclusion does not mean, however, that there are no constraints on the power of school boards to close schools and transfer students; we merely hold that under the facts of this case §1415(b) did not act as such a constraint.

Id., at 756.

Consistent with *Concerned Parents*, the Sixth Circuit addressed whether the alternate programs offered here were "substantially similar" or whether they

were substantially different from those offered at Jewel Manor. The Court concluded that the alternate programs involved substantial changes. Most significantly, the program at Jewel Manor offered a year-round program, while none of the alternate programs extended beyond 180 days. Viewed as a whole, none of the alternate programs were found on this record to be comparable to that offered at Jewel Manor. *See, generally, Battle* v. *Commonwealth of Pennsylvania,* 629 F. 2d 269 (3d Cir. 1980), *cert. denied, sub nom. Scanlon* v. *Battle,* 452 U. S. 968 (1981). The Sixth Circuit therefore properly held the closing of Jewel Manor to be a change in placement, a holding which does not conflict with decisions of this Court or any Circuit Court of Appeals.

CONCLUSION

The Cross-Petition does not present any questions which warrant review by this Court. The Sixth Circuit's decisions concerning educational placement and changes in that placement present no conflict with decisions of this Court or the Circuit Courts of Appeal. The Cross-Petition should therefore be denied.

Respectfully submitted,

GENEVA FAYE PARRIS*
DAVID ALAN FRIEDMAN*
SHAUN W. ESPOSITO
RICHARD W. MCHUGH
Legal Aid Society, Inc.
425 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
Telephone: (502) 584-1254

Counsel for Cross-Respondents, Timothy Tilton, et al.
**Counsel of Record*

Of Counsel:

JUDI M. DAVIS
W. HOWELL HOPSON, III
Western Kentucky
Legal Services

PROOF OF SERVICE

We, Geneva Faye Parris and David Alan Friedman, counsel of record for the Cross-Respondents, having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of this Brief were mailed, first class mail, postage prepaid, to Dan C. McCubbin, Counsel for the Cross-Petitioners, 3332 Newburg Road, Louisville, Kentucky 40218, this 29 day of December, 1983.

Geneva Faye Parris

GENEVA FAYE PARRIS

David Alan Friedman

DAVID ALAN FRIEDMAN